

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**IN RE NAMENDA ANTITRUST
LITIGATION**

No. 1:15-CV-07488-CM-JCF

**DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR A PARTIAL TWO-DAY SCHEDULE EXTENSION**

EXPEDITED BRIEFING SCHEDULE AND HEARING REQUESTED

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I. INTRODUCTION AND BACKGROUND

Yesterday Dr. Ernst R. Berndt, one of Plaintiffs' experts in this matter, informed Plaintiffs of the passing of his brother, Rev. Juan Berndt. Dr. Berndt requested two additional days to submit his reply expert report, which under the Third Case Management Order, is due on October 23, 2017. *See* ECF No. 397 ("CMO No. 3"). Plaintiffs promptly approached counsel for Forest,¹ who consented to the two-day extension, to October 25, 2017, for Dr. Berndt. Forest, however, refused to agree to a commensurate two-day extension for the reply reports of two additional experts who each are relying, in part, on Dr. Berndt, nor for Plaintiffs' class certification reply memorandum, which will be supported by these same experts. In light of the exigencies of the schedule, Plaintiffs respectfully request an expedited briefing schedule as well as a hearing no later than tomorrow, October 20, 2017. This request does not affect the service of the other five expert reports that will be served on October 23, 2017.

Specifically, the reply expert reports of Dr. Russell L. Lamb and Professor Einer R. Elhauge will both rely on Dr. Berndt's opinions as an input for their conclusions, and they cannot finalize their reports without Dr. Berndt's final report. Nor can Plaintiffs finalize their class certification reply without final versions of all three reports, which will support Plaintiffs' arguments. Accordingly, Plaintiffs are forced to seek relief from the Court for a 48-hour extension for the service of the Berndt, Elhauge and Lamb reply reports, and Plaintiffs' reply class certification memorandum.

The relief requested will not prejudice Defendants. *First*, Plaintiffs have offered Forest the option to push back the deposition of Dr. Berndt by three business days (five calendar days), from November 2, 2017 to November 7, 2017. *Second*, the depositions of Prof. Elhauge and Dr. Lamb

¹ Forest refers to Defendants Forest Laboratories, Inc., Forest Laboratories, LLC, Forest Laboratories Holdings Ltd., and Actavis plc.

are already scheduled for November 9 and 10, 2017, respectively, which already provides Forest ample time to prepare, whether those experts' reports are served on October 23 or October 25. *Third*, while the parties' exchange of their experts' reports to date has occurred very late in the evening of their respective due dates, Plaintiffs have offered to serve the expert reports of all three experts at issue, and Plaintiffs' reply class certification memorandum, by 5:00 PM Eastern on October 25, 2017 (which means that Plaintiffs are effectively seeking a 41-hour extension; midnight Monday to 5 p.m. Wednesday). *Fourth*, Plaintiffs have offered to provide all expert backup material on October 26, 2017, the exact same day it would otherwise be due, even if their reports were served on October 23, under the protective order covering this litigation and under the current schedule. *See* Stipulated Amended Protective Order, ECF No. at ¶ 15 (requiring the provision of backup material within 3 days of service of expert reports). *Fifth*, as of just a few weeks ago, the close of expert discovery was set for November 3, 2017, while the date for reply expert reports and Plaintiffs' class certification reply was the same as it currently is: October 23, 2017. Forest sought an adjustment for the close of expert discovery to November 10, 2017, and Plaintiffs consented. Adjusting the date for three experts' reply reports and Plaintiffs' class certification reply still places Forest *ahead* of where it would have been before the entry of CMO No. 3. And *sixth*, Forest will still be served with five other expert reports on October 23, 2017, which should keep it sufficiently busy for the less than 41 hours it will take to receive the remainder of the material subject to this motion.

II. ARGUMENT

Under Federal Rule of Civil Procedure 16(b)(4), “[a] schedule may be modified only for good cause and with the judge’s consent.” In this Circuit, “the [] ‘good cause’ inquiry is primarily focused upon the diligence of the movant in attempting to comply with the existing scheduling order and the reasons advanced as justifying that order’s amendment.” *Soroof Trading Dev. Co. v.*

GE Fuel Cell Sys., LLC, 2012 U.S. Dist. LEXIS 178205, at *5 (S.D.N.Y. Dec. 13, 2012) (Francis, J.), quoting *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 282 F.R.D. 76, 79-80 (S.D.N.Y. 2012). Secondary factors “include[] whether the request is opposed, whether the non-moving party would be prejudiced, and whether further discovery is likely to lead to relevant evidence.” *Soroof Trading Dev. Co.*, 2012 U.S. Dist. LEXIS 178205, at *6, citing *Callaway Golf Co. v. Corporate Trade, Inc.*, No. 10 Civ. 1676, 2011 U.S. Dist. LEXIS 44756, 2011 WL 1642377, at *4 (S.D.N.Y. April 25, 2011).

A. Plaintiffs Have Been Diligent But Were Met with Unfortunate Circumstances Beyond Their Control, and Have Thus Satisfied the “Good Cause” Requirement of Rule 16(b)(4)

Plaintiffs have been diligent in expert discovery and have met all applicable deadlines. Plaintiffs and their experts were also prepared to meet the October 23, 2017 deadline for reply expert reports and their class certification reply until they were met with circumstances outside of their control and promptly requested from Forest a very short extension appropriate under the circumstances. *See George v. Harris Cty.*, No. H-10-3235, 2011 U.S. Dist. LEXIS 84501, at *1 (S.D. Tex. Aug. 2, 2011) (illness of counsel held to satisfy good-cause requirement); *Ganem v. Liberty Life Assurance Co.*, No. 1:12-cv-00128-GZS, 2013 U.S. Dist. LEXIS 86037, at *20 n.5 (D. Me. May 31, 2013) (denying leave to amend as futile but noting that death of counsel would have satisfied the good-cause requirement under Rule 16(b)(4)).

B. The Secondary Rule 16(b)(4) Factors Balance in Plaintiffs’ Favor

The secondary factors in determining whether an extension is appropriate balance in Plaintiffs’ favor. While Forest opposes the relief requested, as set forth above, Forest will not suffer from any meaningful prejudice from receiving three out of eight expert reports less than 48-hours after they otherwise would have. In fact, Forest will still have *more time* to process Plaintiffs’ reply expert reports in advance of summary judgment than it did just a few weeks ago, when at Forest’s

request, Plaintiffs consented to the scheduling adjustment reflected in CMO No. 3. Forest will still have plenty of time for depositions,² and the date for Summary Judgement and *Daubert* briefs is not affected. As for the slight delay in service of Plaintiffs' class certification reply, after that brief is submitted the issue will be *sub judice*, requiring no further response from Forest. And the class certification argument has not yet been scheduled.

C. Plaintiffs Would Be Prejudiced Without an Extension

While Forest agrees that a two-day extension for Dr. Berndt's reply report would be appropriate, it offers no accommodation to account for the materials that rely on that report. It would be unfair to force Plaintiffs into an untenable situation whereby the Berndt report, a necessary input to the Lamb and Elhauge reports, and Plaintiffs' reply class memorandum, should be finalized and served after those other materials. In short, Plaintiffs would be prejudiced absent the short extension.

III. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request a minor extension, to 5 P.M. Eastern on October 25, 2017 for the service of the reply expert reports of Drs. Berndt and Lamb and Prof. Elhauge, and the service and filing of Plaintiffs reply class memorandum. Plaintiffs also respectfully request an expedited briefing schedule and a hearing no later than tomorrow, October 20, 2017.

Dated: October 19, 2017

Respectfully Submitted:

/s/ Dan Litvin

² While there are depositions of Forest experts scheduled for October 25, 2017 (Alexandra Mooney Bonelli) and October 26, 2017 (Philip Green), Forest will not be prejudiced by proceeding with them. Forest originally offered the Bonelli deposition on October 17, 2017, *before* the current due date for reply reports, but agreed to October 25 at Plaintiffs' request. While Plaintiffs could have insisted on taking Mr. Green's deposition before October 23 -- the date expert reply reports are due -- they agreed to Forest's request to schedule Green for October 26. Plaintiffs are further amenable to rescheduling Mr. Green's deposition.

Dan Litvin

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CERTIFICATE OF SERVICE

I, Dan Litvin, hereby certify that I served a copy of this Memorandum on all counsel via electronic mail.

Dated: October 19, 2017

/s/ Dan Litvin
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